Supreme Court of the United States

OCTOBER TERM, 1940.

No. 427

CITY OF HURON, A MUNICIPAL CORPORATION,
Petitioner,

vs.

T. G. EVENSEN, TRUSTEE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF T. G. EVENSEN, TRUSTEE, RESPONDENT, IN OPPOSITION

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BRIEF OF T. G. EVENSEN, TRUSTEE, RESPONDENT, IN OPPOSITION

SUMMARY AND SHORT STATEMENT OF THE CASE

This action is brought by T. G. Evensen, as Trustee, as the owner of and the party in possession of seventeen special assessment paving bonds issued by the City of Huron, South Dakota, and upon the theory that the City of Huron has become primarily and directly liable for the payment of both principal and interest on such bonds by reason of its failures to comply with the provisions of the bonds pledging the good

faith of the City in the collection of the assessment certificates which had been issued by the City of Huron following the paving of part of Dakota Avenue North, the main north and south street of Huron.

The trust agreement attached to the complaint specifically provides for the pro rata payment to the holders of the seventeen bonds of all moneys collected, thereby eliminating from consideration the question of whether or not upon the insolvency of the assessment district pro rata payment of principal and interest must be provided for and the complaint alleges, and the stipulation of facts shows, the *bona fide* effort of the Trustee to reach an adjustment with the City of Huron, which had failed, and the Trustee is vested with authority to negotiate at any time for a settlement and adjustment.

The Trustee, therefore, is properly in Federal Court, as conceded by petitioner, and has the right to have this case decided in the Federal Court under the decision of the Supreme Court of the United States in *Bullard vs. Cisco,* 290 U. S. 179, 78 L. Ed. 254.

While, in that case, a bondholder committee arrangement was involved, the Court found from the arrangement a trusteeship such as was set up here, and this decision squarely sustains the right of the plaintiff to maintain this action.

The action is brought to enforce the contract provisions of the bond set out in full in the complaint (R. 3-5), for the failure of duty on the part of the City of Huron to enforce the payment of the assessment certificates set out in detail in paragraphs 11 and 12 of the complaint (R. 1-14), the stipulation of facts (R. 32-52), and the findings of fact (R. 61-63), and although we believe that several of the items of such default and failure on the part of the City of Huron would, by themselves, be sufficient to authorize a recovery

by the plaintiff in this case, we shall confine our consideration of the matter at this time to the fact that the City of Huron never during any of the years of 1932 to 1938 made a valid or legal certification of the delinquent installments on the special assessments to the County Auditor of Beadle County, South Dakota, so that no valid sale could ever have been made by the County Treasurer of Beadle County, South Dakota.

The stipulation of facts upon which the findings of fact were based, and appearing on pages 32 to 52, transcript of record, after setting up the proceedings for the creation of the paving assessment district, the completion of the paving, the issuance of assessment certificates, to the City of Huron, which at all times remained its property, on pages 36 to 38, inclusive, show a most flagrant disregard by the City Auditor of the City of Huron of the duty of the City of Huron to collect these special assessment certificates in compliance with the pledge of its full faith and credit contained in the bond that this would be done, and they clearly show that the City having obtained the money to pay for the paving of the north end of its main street, that it had little, if any, concern about enforcing the payment of the special assessment certificates.

The certificates which were actually made by the City Auditor of Huron show that for the years of 1932, 1933, 1934, 1935, and 1936 (R. 38-43) were directed to the County Treasurer of Beadle County, South Dakota. The first two stated that they were made in accordance with Chapter 6402 of the 1919 Session Laws instead of the 1919 Code. That as to the certificate dated September 20th, 1932, all of the items of the descriptions, numbers, and amounts of the assessments were copied directly into the assessment book of the Treasurer of Beadle County, South Dakota, by the City

Auditor and in his own handwriting (R. 39). That as to the 1933 certification, the original thereof appears in the office of the County Treasurer of Beadle County, South Dakota (R. 41). That as to the certificate for 1934, the original thereof was placed in the County Treasurer's loose leaf special delinquent assessment book, and the certificate did not contain the seal of the City of Huron (R. 41-42). That the certificate for 1935 was attached to the original of the list of delinquent special assessments and the original thereof placed in the loose leaf special delinquent assessment book of the Treasurer of Beadle County (R. 42). That the certificate as to the 1936 delinquencies was attached to the original list made a part of the same record in the office of the County Treasurer of Beadle County. That none of these certificates were ever presented to or filed in the office of the County Auditor of Beadle County as required by law, and that as to none of these certifications for the years of 1932 to 1936, inclusive, did the County Auditor ever make a certification over to the County Treasurer of Beadle County, South Dakota, as required by law (R. 38-43).

That under date of October 1st, 1937, the City Auditor of Huron made a certificate; that the name "Treasurer" was scratched and the name "Auditor" inserted, and the County Auditor of Beadle County, South Dakota, for the first time and under date of October 4th, 1937, wrote a letter transmitting such list to the County Treasurer of Beadle County, South Dakota, and the original certificate and list became a part of the original record in the office of the County Treasurer of Beadle County, South Dakota, so that on the one occasion when the City Auditor of Huron did direct his certification to the County Auditor as provided by law, the County Auditor did certify the same to the County Treasurer (R. 43-44).

That under date of October 1st, 1938, the City Auditor of Huron made up a certification running to the County Auditor and County Treasurer of Beadle County; that the original certificate and original pages of special assessments therein referred to were a part of the original record of the office of the County Treasurer of Beadle County, and bear no evidence that the same were ever filed in the office of the County Auditor of Beadle County, and that no certificate was made by the County Auditor to the County Treasurer, and that there is endorsed on said list of delinquent special assessments "Received October 28, 1938, by Treasurer," which endorsement was placed thereon by the Deputy County Treasurer of Beadle County, South Dakota, showing the receipt of this list twenty-eight days after the time fixed by law for the filing thereof by the City Auditor with the County Auditor, and that then it was received by the Treasurer and not by the Auditor (R. 44).

These facts are fully found by the Court in paragraph 9 of the findings of fact (R. 61-63), and clearly show that the City of Huron did not in fact at any time, unless possibly in 1937, make the legal certification of the delinquent special assessments, and the Court was fully warranted in finding that no legal certification was made in any form for the years of 1932 to 1936, inclusive, a longer period than that covered in the McLaughlin case hereinafter referred to, and that neither of the other certifications were valid, and that the purported sale of a portion of the descriptions by the County Treasurer in 1935 was wholly void, so that the purported purchaser, Beadle County, on behalf of the City of Huron, acquired no rights whatever by such sale.

POINTS AND AUTHORITIES

Point 1. The petition for certiorari should be denied for the reason that there is no merit in it; that the issues involved do not bring it within any of the provisions of Subdivision 5 of Rule 38 of this Court; that the decision is based upon the South Dakota statutes and decisions and therefore could not be in conflict with the decision of the Tenth Circuit, also based upon construction of local law of another state.

McLaughlin vs. Turgeon, 75 F. (2d) 402.

City of Canton vs. Tinan, 104 F. (2d) 961.

Paine vs. Willson, 146 F. 488, 77 C. C. A. 44.

Detroit vs. Osborne, 135 U. S. 492, 34 L. Ed. 260.

Magnum Import Co. vs. Coty, 262 U. S. 159, 67 L. Ed. 922.

Ruhlin vs. N. Y. Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290.

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Bessemer Inv. Co. vs. City of Chester, 113 F. (2d) 571.

Denny vs. City of Spokane, (9th C. C. A.) 79 F. 719, 25 C. C. A. 164.

City of Brookings vs. Natwick, 22 S. D. 322, 111 N. W. 376.

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Section 6409, R. C. 1919, as amended by Chapter 319, S. L. 1921, now Section 45.2114, S. D. C. 1939.

Chapter 199, S. L. 1929, now Section 45.2115, S. D. C. 1939.

Chapter 190, S. L. 1939.

Section 1967, R. C. 1919, now Section 37.1802, S. D. C. 1939.

Subdivision C of Rule 8 of Federal Rules of Civil Procedure.

Point 2. That the attempted method of the City Auditor of Huron to certify the delinquent installments of the assessment certificates was a nullity and everything done under it void; that the City did not in good faith collect the assessments; and that the appellee has a right to recover.

City of McLaughlin vs. Turgeon, 75 F. (2d) 402.

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Coolsaet vs. City of Veblen, 55 S. D. 485, 226 N. W. 726.

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Shipman vs. Forbes, 97 Cal. 572, 32 Pac. 599.

Cohn vs. Federal Const. Co., 171 Cal. 547, 153 Pac. 916.

Collier vs. Goessling, 160 F. 604, 87 C. C. A. 506. Certiorari denied, 215 U. S. 596, 54 L. Ed. 342.

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Peterson vs. Graham, 130 Ore. 290, 282 Pac. 1084.

Bays vs. Trulson, 25 Ore. 109, 35 Pac. 26.

Brady vs. Davis, 168 Cal. 259, 142 Pac. 45.

Reynolds vs. Fisher, et al., 43 Neb. 172, 61 N. W. 695.

Platte Valley Milling Co. vs. Malmsten, 79 Neb. 730, 113 N. W. 229, 79 Neb. 735, 116 N. W. 962.

Highlands vs. Johnson, 24 Colo. 371, 51 Pac. 1004.

STATUTES

Section 6402, Revised Code of South Dakota for 1919, as last amended by Chapter 187, Session Laws of South Dakota for 1929.

Section 6797, Revised Code of South Dakota for 1919.

Section 6799, Revised Code of South Dakota for 1919, as amended by Chapter 198, Session Laws of South Dakota for 1933.

Section 6804, Revised Code of South Dakota for 1919.

Section 12.0807, S. D. C. 1939.

Section 12.0816, S. D. C. 1939.
Chapter 198, S. D. 1933, Section 3.
Section 65.0103, S. D. C. 1939.

Point 3. That where there has been no valid and legal certification of the delinquent installments, or the City has failed to diligently enforce collection, the City has broken its pledge of its good faith in the collection of such special assessments and has made itself liable for the entire amount of the bonds, principal and interest.

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City of Cattletsburg vs. Trapp, 261 Ky. 347, 87 S. W. (2d) 621.

City of Cattletsburg vs. Cit. Nat. Bank, 234 Ky. 120, 27 S. W. (2d) 662.

Point 4. That the respondent is entitled to recover both principal and interest on all of the bonds, including those not yet due on their face, or, if not so entitled, is entitled to judgment for all principal and all interest, and to a declaratory judgment that the City of Huron is directly and prima-

rily liable for the bonds maturing November 1st, 1939, and 1940.

65 *A. L. R.* 1379.

87 *A. L. R.* 1205.

Aetna Life Ins. Co. vs. Haywerth, 300 U. S. 227, 81 L. Ed. 617.

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Columbia Nat. Ins. Co. vs. Folke, 89 F. (2d) 261.

Anderson vs. Aetna Life Ins. Co., 89 F. (2d) 345.

Sanford vs. Comr. Int. Revenue, 84 L. Ed. Adv. Sheet 53, decided Nov. 6th, 1939.

STATUTES

Section 400 of Title 28, Judicial Code of U. S.

Rule 57 of the Federal Rules of Civil Procedure.

The petitioner has submitted substantially its entire brief used on its appeal to the Circuit Court of Appeals in support of its petition, and has cited so many sections of the statutes and decisions that we feel compelled to answer them, although it requires a longer brief than should ordinarily be appropriate in opposition to a petition for certiorari.

ARGUMENT

Point 1. The Petition For Certiorari Should Be Denied For the Reason That There Is No Merit In It; That the Issues Involved Do Not Bring It Within Any of the Provisions of Subdivision 5 of Rule 38 of This Court; That the Decision Is Based Upon the South Dakota Statutes and Decisions and Therefore Could Not Be In Conflict With the Decision of the Tenth Circuit, Based Upon Construction of the Local Law of New Mexico.

The sole reasons assigned for the granting of the writ are that the decision is in conflict with that of the Circuit Court of Appeals for the Tenth Circuit, with the statutes of the State of South Dakota, and the decisions of the Supreme Court of South Dakota, as set out in Subdivision D, page 7, petitioner's brief.

There is no merit to this position because the decision is based upon two cases in which there was thorough consideration by the Eighth Circuit of four decisions of the South Dakota Supreme Court and of eight provisions of the statutes of South Dakota as set out at length in *McLaughlin vs. Turgeon*, 75 F. (2d) 402; that the case from the Tenth Circuit, *Gray vs. City of Santa Fe*, 89 F. (2d) 406, is also based upon the statutes and decisions of the State of New Mexico and squarely recognized the doctrine of the McLaughlin case as being sound under the facts upon which it was based, and that there is no decision of this Court in any way conflicting therewith.

This will necessarily require a careful consideration of the statutes of the State of South Dakota, only part of which have been set out in the petition, and of certain of the decisions of the South Dakota Court.

It clearly appears from the decision of the Circuit Court of Appeals (R. 75-80) reported in the September 9th, 1940, Advance Sheet of 113 F. (2d) 598, that the case sought to be reviewed was decided upon the statutes of the State of South Dakota and the former decisions of the Eighth Circuit in *City of McLaughlin vs. Turgeon,* 75 F. (2d) 402, and *City of Canton vs. Tinan,* 104 F. (2d) 961, and it seems clear to us from the provisions of Subdivision 5 of Rule 38 of this Court, as construed by this Court, that this being true, the fact, if it were a fact, which it is not, that the Tenth Circuit had arrived at a different result, would be wholly immaterial.

The McLaughlin case contains an exhaustive examination of the statutes of South Dakota relating to special assessment projects, special assessments, special assessment bonds, and the effect of the full faith and credit clause in the bonds involved in this case.

The sole question which was raised in the companion cases of *City of Canton vs. Tinan,* 104 F. (2d) 961, and *City of Canton vs. Retirement Board,* 104 F. (2d) 963, was that the decision in the McLaughlin case was contrary to the decision of the Tenth Circuit in *Gray vs. City of Santa Fe,* 89 F. (2d) 406, and the Circuit Court of Appeals on page 963 rightly found that the Gray case recognized certain controlling differences in the facts of the case before it for decision, and an analysis of the Gray case will show that that Court recognized that where the city has, by its neglect of duty, permitted a valid assessment to expire and become uncollectible, the city is liable for breach of duty or contract to pay the debt evidenced by the certificate or bond, citing, among other cases, *McLaughlin vs. Turgeon,* and six other cases outside of South Dakota which we had cited in our brief in the Circuit Court of Appeals, together with the two South Dakota cases chiefly

relied upon in the McLaughlin case, those of *Freese vs. Pierre* and *Coolsaet vs. Veblen,* and it clearly appears that the Federal Court of the Tenth Circuit reached the decision which it reached following the statutes of New Mexico and the decisions of the Supreme Court of that State, thereby clearly showing that our Court was right in the conclusion that it drew with relation to this case in its opinion in the Canton case.

The fact is that the Eighth Circuit in the McLaughlin case took great care to construe South Dakota statutes and to follow the decisions of the South Dakota court in arriving at its decision, with the result that, while the opinion in that case was written by Judge Gardner, who for more than thirty years was an outstanding authority on the tax laws of the State of South Dakota, the rule laid down by him in that case was concurred in by two Circuit judges, was followed in the Canton cases by two Circuit judges and a District judge, and in the case at bar by two Circuit judges and a District judge, so that we have seven separate Federal judges who have given this matter study, held that it was controlled by the South Dakota statutes and decisions, and carefully applied them.

In fact, this is not a new rule for the Eighth Circuit, because as early as *Paine vs. Willson,* 146 F. 488, 77 C. C. A. 44, the Court, in an opinion by Judge Walter H. Sanborn, passing upon the validity of a tax deed, and in holding that a tax deed was void where not even ditto marks appeared below the number of a township or range, followed the North Dakota Supreme Court and said that "the question which this specification of error presents is not whether or not this Court will be of the opinion that the description here presented was sufficient in the absence of controlling authority, but is whether or not the Supreme Court of North Dakota

has decided that such a description is fatally defective for the decision of that court upon such question establishes a rule of property in that State which must prevail in the Federal Courts," citing four cases of the Circuit Court of Appeals, and *Detroit vs. Osborne,* 135 U. S. 492, 10 S. Ct. 1012, 34 L. Ed. 260.

It is clear that the appellate court, when it decided the Canton cases on June 26th, 1939, and this case on July 9th, 1940, was sufficiently conversant with its duty under *Erie vs. Thompkins* and did not disregard those cases, as petitioner's counsel assert they did.

It appears to us that counsel have overlooked the basic theory of certiorari from this Court, and that, as said by the Court in *Magnum Import Co. vs. Coty,* 262 U. S. 159, 67 L. Ed. 922, "the jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

The latest expression on the subject that we have seen is that of Justice Reed in *Ruhlin vs. N. Y. Life Ins. Co.,* 304 U. S. 202, 82 L. Ed. 1290, where, on page 1292 of the L. Ed., after referring to the provisions of the rule permitting certiorari to issue on a showing of a conflict of circuits, it is said:

> "As to questions controlled by State law, however, conflict among Circuits is not of itself a reason for granting a writ of certiorari. The conflict may be corollary to a permissible difference of opinion in the State courts. The rules indicate that the Court will be persuaded to grant certiorari where a Circuit Court of Appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition."

It is significant that the McLaughlin decision was handed down on January 28th, 1935, while the legislature of the

State of South Dakota was in session, which session continued until the 4th of March following, and that there have been two regular sessions since then, those of 1937 and 1939, with no attempt made to pass any statute which would place a different construction upon our special assessment bond issues to be thereafter issued, assuming that under both the South Dakota cases and the Federal decisions that could not be done as to bonds theretofore issued.

It is further significant that Section 6409 of the Revised Code of 1919, as amended by Chapter 319 of the Session Laws of 1921, permitting municipalities to issue their negotiable bonds in an amount equal to the entire assessment, and sell the same at not less than par, with accrued interest, to pay the cost of improvement, was not only not repealed but was carried into the codification of the laws when the new Codes were adopted at the 1939 session of the legislature as Section 45.2114 thereof.

And it is even more significant that the provisions of Chapter 199 of the Session Laws of 1929, which provide, "The portion of the cost of public improvements to be paid by the municipality either as the public assumption of a part of the cost, the payment of an assessment levied against property owned by the municipality or the United States Government *or because of the municipality being required to purchase any past due unpaid Special Improvement Bonds issued in accordance with the provisions of Section 6409 of the South Dakota Revised Code of 1919, as amended*, may be paid out of funds of the municipality not otherwise appropriated, or the governing body of the municipality may and is hereby authorized to issue bonds to an amount not exceeding one-half of one per cent of the valuation of all the property in the municipality as equalized for taxation purposes within the year preceding the date of issuance of said

bonds," was not only not repealed but was carried into the 1939 Code as Section 45.2115, with the sole addition of these words, "after authorization and in the form and manner provided for general obligation bonds," with the remainder of the section providing for the handling of funds received from such bonds.

Then, again, we find that, after expressly recognizing that a city or town may be liable to pay its special assessment bonds, as the legislature did in each of the Acts above set out, Chapter 190 of the Session Laws of 1939 was enacted amending Chapter 45.2119, S. D. C. 1939, to read as follows:

> "That the governing boards of cities and towns in this state be, and they are hereby authorized and permitted to compromise any special assessment against lots, or parcels of real estate, situated in such cities or towns when the city or town is the owner of Special Assessment Certificates against such real estate or lots or when bonds of such cities or towns were or are issued in lieu of Special Assessment Certificates and such bonds were or are retired by the cities or towns *as their obligations.* Provided, however, that such compromise cannot reduce the amount of such special assessments less than the principal amount of the special assessments."

Certainly, all of these provisions of the Code and this 1939 amendment would be idle if the legislature of the State of South Dakota did not recognize a liability of its cities and towns on their special assessment bonds.

The soundness of its construction of Rule 38 by this Court in the Ruhlin case is particularly illustrated by the fact that this Court now is asked to substitute its judgment of whether or not the South Dakota law has been followed for that of seven judges of the Circuit Court of Appeals of the Eighth Circuit, and the Federal District judge, the various judges

who are continuously in touch with the laws of the State of South Dakota.

The Supreme Court of South Dakota as late as October 26th, 1933, in *Warren vs. Blackman, et al.*, 62 S. D. 26, 250 N. W. 681, considering the special assessment law of South Dakota, said on page 683:

> "It is made the duty of the City Auditor under the provisions of Section 6402, Rev. Code 1919, as amended by Chapter 187, Laws 1929, to certify to the County Auditor prior to the 1st day of October all special assessments remaining unpaid which become due or delinquent on or before the 15th of September. Section 6797, Rev. Code 1919, provides that, whenever delinquent special assessments shall be certified to the County Auditor, it shall be his duty to immediately certify the same to the County Treasurer, and that delinquent special assessments shall be collected by the County Treasurer by sale of the lots or parcels assessed at the next succeeding sale of real property for delinquent taxes. This section further provides that 'sales of property made for the collection of delinquent special assessments shall be conducted in the same manner as other tax sales made by the County Treasurer and the owners of the property so sold shall have the same length of time in which to redeem the same, and be entitled to the same notice before the issuance of a tax deed as in other cases of tax sales'."

This furnishes a solid foundation for the view of the Circuit Court of Appeals in this case of the duty of the City Auditor with relation to delinquent special assessments.

The rule stated in *Freese vs. Pierre*, *Coolsaet vs. Veblen*, and the numerous decisions of the Eighth Circuit Court of Appeals, set out in *Turgeon vs. McLaughlin*, *supra*, on p. 410 of the 75 F. (2d) that a city which agrees to pay out of special assessments, and then either fails to create them or to

collect them, is liable for the contract price or the amount of the bonds, with interest, is proper both under the common law and the provisions of Section 1967 of the 1919 Code of South Dakota, which reads, "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon," which has continued to be the law and was carried forward as Section 37.1802 S. D. C. 1939. It is the only rule of law that could apply to this class of obligation, notwithstanding the persistent effort of petitioner to claim the contrary by the citation of numerous sections of the statutes which do not apply, and the omission of this section.

The decision in the McLaughlin case relies upon the decisions of the South Dakota Supreme Court in *Freese vs. City of Pierre,* 37 S. D. 433, 158 N. W. 1013, and *Coolsaet vs. City of Veblen,* 55 S. D. 485, 226 N. W. 726, and it is clear that in each of these cases the South Dakota Supreme Court held that, where the city had delivered its special assessment certificates in payment of the contract price for a special improvement, when it became impossible to collect the special assessment certificates that the city was liable for the full contract price with interest, and in each of those cases the South Dakota Court specifically established this remedy.

Counsel for the petitioner have attempted in a number of places in their brief to distinguish these cases by saying that in each of them the contractor who received the original certificates had brought the suit, implying that he would have greater rights than a bondholder who furnished the cash to the city to pay for the improvement.

It requires no citation of authority or proof to support the statement that, where the certificate holder was the contractor who had made his bid knowing that he would have to take special assessment certificates in payment, instead of

being paid in cash out of the proceeds of the sale of bonds, as was done here, under the alternative method in South Dakota, he invariably took into account the probable losses on collection of assessment certificates, and the contract price was higher by that amount so that the city as a whole benefited by obtaining the bids on a cash basis.

On page 46, petitioner's brief, Section 1319 of the Political Code of 1903, is set out, with the statement that the Freese decision was influenced by this statute, which was not carried into the later codification. While this section is set out in the Freese case, the Supreme Court refused to follow it, and instead adopted the measure of damage set out in *Barber Asphalt Paving Co. vs. City of Denver,* (8 Cir.), as conclusively appears from the following statement taken from pages 1015-1016 of 158 N. W.:

> "It seems to be the generally accepted rule that, in the absence of express provision to the contrary, a municipal corporation impliedly contracts to cause a valid assessment to be made when it enters into a contract for a street improvement which is to be paid for by special assessment, and that, when an assessment is invalid because of some defect in the proceedings which is chargeable to it, the municipal corporation is holden to the contractor. We are of the opinion that the above rule is a reasonable one and that it is applicable to the case before us. Some of the principal authorities for these views are *Barber Asphalt Paving Co. vs. City of Denver,* 72 Fed. 336, 19 C. C. A. 139; *District of Columbia vs. Lyon*, 161 U. S. 200, 16 Sup. Ct. 450, 40 L. Ed. 670; *Gilcrest vs. City of Des Moines,* 157 Iowa 525, 137 N. W. 1022; *Pine Tree Lumber Co. vs. City of Fargo,* 12 N. D. 360, 96 N. W. 357; *Rogers vs. City of Omaha,* 82 Neb. 118, 117 N. W. 119; *Terrell vs. City of Paducah,* 122 Ky. 331, 92 S. W. 310, 5 L. R. A. (N. S.) 289; *O'Neil vs. City of Portland,* 59 Ore. 84, 113 Pac. 655; *Hamilton on Spe-*

cial Assessments, Sec. 671-675; *Page & Jones on Taxation by Assessment,* Sec. 1507. In *Barber Asphalt Paving Co. vs. City of Denver, supra,* the United States Circuit Court of Appeals for this circuit, said:

"'If a municipal corporation which has the power to make a contract for street improvements contracts for them, and stipulates in the contract that the agreed price of the improvements shall be paid to the contractor out of funds realized or to be realized by assessments upon abutting property, the city is primarily and absolutely liable to pay the contract price itself, if it has no power to make such assessments, or if the assessments it attempts to make are void.'

"It further clearly appears that the city might be holden to the contractor upon an entirely different theory than the one above set forth, and the pleadings and evidence are adequate to uphold a decision under this other theory. The city assigned to plaintiff, on July 23, 1910, treasurer's sale certificates aggregating the sum of $4,825.25 on the property in question issued to it under the sale held on March 7, 1910. It will be noticed that this aggregate sum was considerably in excess of the amount then due on the Fanebust contract. Section 1319, Pol. Code, provides:

"'Whenever a special assessment for a local improvement shall be set aside or declared null and void by a court of competent jurisdiction, the city shall save the purchaser at the sale for said special assessment harmless, by paying him the amount of the principal which he paid upon such sale, together with interest at 12 per cent per annum from the date of sale.'

"If, then, the city had authority to assign those certificates to plaintiff, he then occupied the same position with reference to them as a purchaser at the treasurer's sale would have occupied, and he would now be entitled to the amount of the certificates with 12 per cent interest, and this without regard to the claim of the city that

> plaintiff took said certificates in full settlement of the contract. If plaintiff were allowed judgment on that theory, the amount would be greatly in excess of the amount adjudged to be due him by the trial court."

Nothing could more clearly show that the Supreme Court of South Dakota approved of the earlier decision of the Eighth Circuit Court of Appeals, and did not base the Freese decision on Section 1319 of the Political Code.

It is to be noted that in that case the Court rendered judgment for the full amount due against the City, although in the same action it ordered a re-assessment for the benefit of the city and did not attempt to find a value of the re-assessment or reduce the judgment accordingly.

This not only leaves the statement made on page 46, petitioner's brief, "it indicated a statutory policy of liability, since repealed, which reveals, if anything, a legislative policy to exempt cities from liability to remit the purchaser to his remedy against the property provided by Section 6412, Rev. Code 1919," wholly without support in the Freese case, but exceedingly misleading because these assessment certificates at all times belonged to the City, the bondholder had no lien on them and no right to sue on them, nor to take any other proceedings on them, so it was the City of Huron, as the owner of the assessment certificates which had and has all rights under this statute.

The Coolsaet case is criticized on page 47, petitioner's brief, with the statement that, it is complicated by the fact that the City had entered into a stipulation for judgment, which criticism is unwarranted by reason of the specific finding of the Court that the stipulation would not be valid unless the City owed the debt. And then the Court specifically finds as one of the reasons why the assessment certificates which had been

issued to pay for an improvement were void was the failure of the proper officer to certify a copy of the assessment roll describing the properties assessed to the County Auditor, and in sustaining a judgment for the contractor for the water mains for the entire amount of the contract price the Court on page 727 of the N. W. said:

> " * * * After completion and acceptance of the work, the city issued to respondents the assessment certificates, but they proved to be null and void by reason of procedural defects, and the failure of the proper officer to certify a copy of the assessment roll, describing the properties assessed, to the County Auditor, on account whereof the special assessment was not spread upon the tax books and made a lien against the said properties. * * * "

This case was decided in 1929, or ten years after petitioner says that Section 1319 was repealed by omission from the 1919 code, yet the Court on page 728 said, "consistent with the principles applied in *Freese vs. Pierre*, 37 S. D. 433, it must be held that the plaintiffs were entitled to recover judgment for the amount of their contract and interest."

When petitioner says on page 42, petitioner's brief, that there was no inquiry as to the amount of the damages, and argues that this was error, it overlooks the rule laid down both by the South Dakota Court and the Eighth Circuit that when such contracts were violated the certificate holder or bondholder need not prove the value of each piece of property and the amount of the general taxes against it.

Petitioner also overlooks the fundamental rule that it having possession of the facts, it was its duty to plead and prove them if it thought they would mitigate its damages, although, in plain point of fact, an attempt on its part to show value of lots would have shown that nine years of accumulation of general taxes, which were paramount to the

assessment certificates under the decision of the South Dakota Supreme Court in *Warren vs. Blackman*, 62 S. D. 26, 250 N. W. 681, amounted to more than the cash value of the lots.

That it was the duty of the City to plead any facts constituting mitigation of damages is clear from Subdivision (c) of Rule 8 of the Federal Rules of Civil Procedure.

It would also be the City's duty to plead and prove a defense that there was some collectibility left in the special assessment certificates under the universal rule that the burden of such proof is upon the one having possession of the records and the facts.

The rule is clearly set out in *Bessemer Inv. Co. vs. City of Chester*, 113 F. (2d) 571, on p. 576, in this language:

> "It is clear, we think, that the city's duty of diligence required it to force collection by all available legal means, unless resort to such means would be ineffectual, in which case the city must demonstrate that ineffectuality."

That the delay of the City in making a valid certification of the delinquent special assessments, and the change of the time of the redemption from two to four years from the date of the sale, in itself was sufficient to make the City liable, is carefully shown in the cases analyzed and digested in *Grand Lodge vs. City of Bottineau*, 58 N. D. 740, 227 N. W. 363, cited as one of the main authorities in the McLaughlin case, and in addition to this case on this subject we cite *Denny vs. City of Spokane* (9th C. C. A.), 79 F. 719, 25 C. C. A. 164.

On page 38, petitioner's brief, is cited the case of *Moore vs. City of Nampa*, 276 U. S. 535, 72 L. Ed. 688, with the statement that "this Court held that the cause of action of

the bondholder in a case such as this is not on contract, but is in tort based on negligence."

The reason why the bondholders were non-suited in the Nampa case was because the action was brought in tort in an attempt to hold the City liable for a false and fraudulent certificate made by the city officers who were not required by law to make any certificate of the kind, and because of the fact that the Idaho law had been amended to specifically provide that the bonds transfer to the owner or holder all of the right and interest of the municipality in and with respect to every such assessment and lien and authorize the holder to receive, sue for, and collect or have collected such assessment embraced in any such bond (no such provisions were in the South Dakota law), and the finding on page 690 of the L. Ed., "It is clear that respondent's faith or credit is not pledged," as it expressly was in the case at bar, so that the McLaughlin opinion distinguishing this case did so on an absolutely sound basis.

The statement made on page 35, petitioner's brief, "indeed a local Court would have known judicially that even in prosperous times nearly all property sold for delinquent taxes is purchased by the County," would hardly be made to a local Court because counselor unquestionably knows that for a period of years, when general tax sale certificates in South Dakota drew twelve per cent interest, that a fellow-resident of Huron, South Dakota, repeatedly bid down all of the certificates offered in whole counties to as low as four per cent interest in order to get all of the certificates offered.

The statement made on page 32, petitioner's brief, "it having been shown that property and property-owners remain liable," is not a correct statement because the South Dakota Court has held in *City of Brookings vs. Natwick,* 22 S. D.

322, 111 N. W. 376, that the owner of property is never liable for a special assessment, and that the property alone is liable.

The Court on page 323 of the South Dakota Reports said:

> " * * * There being no contract or promise express or implied, the obligation of the owner is not in the nature of a debt that would have been recoverable by a common-law action of *assumpsit*. That a special assessment is greater than the special benefit conferred may or may not be a valid objection to its enforcement by a sale of the abutting property, but when it exceeds the value of such delinquent property after the local improvement has been completed, the subjection of all other property the owner may possess to execution in satisfaction of a judgment for such assessment is wholly inconsistent with the supposition that he is receiving a special benefit. * * * "

On page 5, petitioner's brief, it is stated that the 1937 and 1938 certifications by the City Auditor were to the County Auditor, which is not correct because the 1938 certification was addressed to the County Auditor and the County Treasurer of Beadle County and the original filed in the office of the County Treasurer bearing no evidence that it had ever been in the hands of the County Auditor, and it was not certified by him (R. 62).

The stipulation of facts (R. 35 to 38) shows a long continued, direct, positive and intentional violation of the laws of South Dakota in the handling of these special assessments, and in the one case shown in the last three lines on page 35 and the first three lines on page 36, with no name on the assessment roll, made any purported sale of that item wholly void under the decision of the Supreme Court of South Dakota in *Morrow vs. Reibe,* 53 S. D. 330, 220 N. W. 870, where the Court said: "The entire omission of the name of the person to whom the property is taxed in the assessment roll in the

duplicate tax list, and in the notice of tax sale, in our opinion renders the tax sale void."

If it should be thought that there was still a possibility that certiorari should be granted to reconcile conflicts in the decisions of different Circuits, the *Bessemer Investment Co. vs. City of Chester,* and eleven other cases (C. C. A. 3), 113 F. (2d) 571, Advance Sheet, September 9th, 1940, should be considered because that case contains one of the most exhaustive considerations of this whole special assessment bond subject to be found anywhere, and it squarely and clearly shows that its decision was based upon the Pennsylvania law, as was the case at bar on the South Dakota law, and the case merits reading because of its very careful and thorough analysis of the fallacy of the argument of petitioner that there is any equity in releasing a city from paying for pavement which it has received and is using, with its repeated quotations from and references to the articles in the 44 Harvard Law Review 610, the 37 Columbia Law Review 177, the Problem of Special Assessments, and 23 National Municipal Review 466. If this case is considered it should be kept in mind that the record in the case at bar does show exactly what remains of the special assessments; that in the period of more than five years from May 1st, 1935, to September, 1939, the City had collected in $2,150.00 on these assessments, which was paid over to the plaintiff prior to the entry of the judgment in the District Court, and that if anyone can collect the assessments it is the City of Huron, so the damage element was fully established in the case at bar.

It should also be kept in mind that the last three bonds mature on November 1st, 1940, and that there is no money to pay them, so that there would need be no remand of this case to determine the effect on the unmatured bonds if the conclusion of both the lower courts was found to be wrong

that the face and accrued interest on the debt represented by the bonds, became due when the City breached its full faith and credit covenant.

In any event no harm could possibly come to the City because the plaintiff asked for and is entitled to a declaratory judgment declaring its direct and primary liability for the remaining principal and interest if the same could not be properly included in the original judgment, as fully argued in point four.

Point 2. That the Attempted Method of the City Auditor of Huron to Certify the Delinquent Installments of the Assessment Certificates Was a Nullity and Everything Done Under It Void; That the City Did Not In Good Faith Collect the Assessments; and That the Respondent Has a Right to Recover.

More concisely stated, the attempted certification of delinquent installments by the City Auditor of Huron directly to the County Treasurer of Beadle County, South Dakota, was a plain violation of the mandatory language of the statutes of this state, and was wholly null and void, and therefore the City of Huron is in identically the situation that this Court found the City of McLaughlin in, in *City of McLaughlin vs. Turgeon* (C. C. A. 8th), 75 F. (2d) 402, and the situation of Canton in *City of Canton vs. Tinan* (C. C. A. 8th), 104 F. (2d) 961, so that while in these cases the decision turns upon the fact that no certification was made during certain years, the situation in this case is identical because the purported certifications were wholly null and void.

We will not burden the Court with a citation or a consideration of the cases which are cited in the *Turgeon vs.*

McLaughlin case, and will so far as possible confine this part of this brief to a consideration of the authorities supporting our contention that in legal effect there was no certification whatever of these delinquent special assessments.

The statutory method of handling these matters is set out in Section 6402 of the Revised Code of 1919, as amended by Chapter 269 of the Session Laws of 1919, and Chapter 187 of the Session Laws of 1929, and reads as follows:

> "CERTIFYING DELINQUENT ASSESSMENTS. It shall be the duty of the city auditor or town clerk, between the fifteenth day of September and the first day of October in each year, to certify to the county auditor of the county in which such municipality is located, all special assessments remaining unpaid, which became delinquent on or before the fifteenth day of September of that year."

Section 6797 of the same Code provides:

> "SPECIAL ASSESSMENTS IN CITIES AND TOWNS. Whenever delinquent special assessments levied in any city or incorporated town shall be certified to the county auditor as provided in article 6, chapter 9, part 8, of this title, it shall be the duty of such auditor to immediately certify the same to the county treasurer, and such delinquent special assessment shall be collected by the county treasurer, by sale of the lots or parcels of land so assessed at the next succeeding sale of real property for delinquent taxes, in the same manner and at the same time and place.

The balance of Sections 6402 and 6797 are important and are set out in full on pages 76-77 Record.

It will be noted that in both of these sections the language is mandatory that the City Auditor shall certify the delinquent installments to the County Auditor, and that the County Auditor shall certify them to the County Treasurer,

and that the County Treasurer shall proceed to sell them, and that these sections apply to all installments delinquent on September 15th of each year.

It should be perfectly patent that if the County Treasurer of Beadle County, South Dakota, had attempted to make a sale of these installments upon a certification directly to him from the City Auditor of the City of Huron, all of his proceedings would have been a nullity, and that therefore it is not the default or neglect or failure of duty of the County Treasurer which is involved, but the neglect and failure of duty upon the part of the City's own officer, its City Auditor, and that this failure is a direct violation of the good faith clause of its bond.

It is also evident that it was the plain intent of the Legislature of this state to provide that the County Treasurer should only sell special assessment installments upon the certification of them to him by the County Auditor of the county, the same official who, by the other sections of our statutes, certifies to the County Treasurer for collection all the general taxes, and this section is so plain and so mandatory that it would have been a matter of ease to have complied with it, and that the failure to comply has rendered the City liable for the entire amount due on these bonds.

The Supreme Court of the State of South Dakota has passed directly upon this precise question, and has repeatedly held that the provisions of these taxing statutes and of the proceedings to divest title through tax and special assessment proceedings are mandatory and must be strictly construed, and we proceed, first, to set out briefly this line of cases, and the line of cases outside of the state holding that the provisions of statutes like these providing for certification by certain officials to certain other officials are mandatory, and that any tax sale proceeding taken without a strict

compliance therewith is wholly void.

The South Dakota Supreme Court in *Huckstedt vs. Jamison*, 59 S. D. 464, 240 N. W. 506, considered the validity of a tax deed, and, in holding that the failure of the County Treasurer to file the tax certificate with the County Auditor was a fatal error voiding the tax deed, said:

> "(2) The rule of construction prevailing in this State was very aptly stated in *Salmer, et al., vs. Lathrop, et al.*, 10 S. D. 216, 72 N. W. 570, 573: 'It seems to be well settled that all legislative enactments appertaining to proceedings to transfer and divest title to real property for nonpayment of taxes must receive a strict construction, and, in the absence of a statute affording relief, the doctrine of *caveat emptor* is applied to purchasers at tax sale.'
>
> "(3) Appellant further contends that the County Treasurer failed and neglected to cancel the tax sale certificates, and that they were not filed by or in the office of the County Auditor, as provided for by Section 6808, South Dakota Revised Code 1919. Section 6808, South Dakota Revised Code 1919 provides: 'When deeds are delivered by the County Treasurer for real property sold for taxes, the certificate therefor must be canceled and filed by the County Auditor, and in case of loss of any certificate, on being satisfied thereof by due proof, and bond being given to the State in a sum equal to the value of the property conveyed, as in cases of lost notes or other commercial paper, the County Treasurer may execute and deliver the proper conveyance and file such proof and bond with the County Auditor.'
>
> "It is hard to conceive under the construction prevailing in this state and other states having similar statutes, and the mandatory language contained within the sections above referred to, how we can sustain the findings and conclusions of the trial court. The law as we find it is opposed to the findings and conclusions made by

the trial court, and we must reverse respondent's judgment entered by the trial court.

"We cannot agree with respondent that the purpose of the statute is merely to direct the treasurer to file such certificate with the auditor and that it was designed to secure order and system in the conduct of business devolved upon them, and that a disregard by the officials could not injure interested parties on account of the officials' neglect. The appellant is entitled to the full observance of the law, and his rights must prevail as against the proceedings shown by the record."

In *Whittaker vs. City of Deadwood, et al.*, 12 S. D. 608, 82 W. 202, the Court said on page 613:

"It is further contended on the part of the appellant that the proceedings of the city were illegal for the reason that the property was not sold at the time specified in the charter. The charter in force at that time provided for a sale of the property of delinquent taxpayers on the first Mondays of December and March in each year. The sale in this case was made on the 20th of December. This was not a compliance with the statute. It is a well settled rule that when municipal corporations seek to impose upon property owners the burden of the cost of street improvements, and to hold the property of abutting owners liable therefor, the constitution, statutes, and charter authorizing such improvements must be strictly complied with. *Mason vs. City of Sioux Falls*, 2 S. D. 640, 51 N. W. 770. '*When the statute under which the sale is made directs a thing to be done, or prescribes the form, time, and manner of doing anything, such thing must be done, and in the form, time, and manner prescribed, or the title is invalid, and in this respect statutes must be strictly, if not literally, complied with.*' *Chandler vs. Spear*, 22 Vt. 398; *Cooley, Tax'n*, 287; 2 *Desty, Tax'n*, 842. Why the sale was not made at the time designated in the law, we are not able

to say; but as the time was fixed by law it was the duty of the city officers to make the sale at the time prescribed."

The Supreme Court of Dakota in *McLauren, et al., vs. City of Grand Forks,* 6 Dak. 397, 43 N. W. 710, cited with approval in *Mason vs. Sioux Falls,* 2 S. D. 647, 51 N. W. 770, on page 711 said:

"* * * The object of this law was to provide a method where, under certain specified conditions, private property may be assessed and taxed for the payment of the expenses of necessary public improvements. Such statutes are in derogation of the common law, and must be construed strictly, and the conditions imposed observed and performed specifically. The omission of any of them is fatal to the legality of all proceedings attempted to be had under it. *Merritt vs. Village of Portchester,* 71 N. Y. 309; *Doughty vs. Hope,* 3 Denio 594; *Sharp vs. Johnson,* 4 Hill 92. * * * "

The Supreme Court of South Dakota in *Wood vs. City of Hurley,* 29 S. D. 269, 136 N. W. 107, on page 283 of the South Dakota Report, holds that the certificate of the City Auditor transmitted to the County Auditor was valid and in proper form, and sets out the form and contents of such certificate.

Except in so far as they attempt to attack the method by which the damage of the plaintiff was established, which was in strict conformity to that approved in the McLaughlin and Canton cases, the only real attempt made by the petitioner to distinguish this case from either of those cases is upon the contention that the provisions of Section 6402 of the Revised Code of 1919, as amended by Chapter 269 of the Session Laws of 1919, and Chapter 187 of the Session Laws of 1929, and Section 6797 of the 1919 Code, with their mandatory requirements that the City Auditor shall certify to the

County Auditor, who shall in turn certify to the County Treasurer, should not be held to be mandatory in spite of what the South Dakota Court and the Circuit Court of Appeals have said was the plain meaning of the South Dakota tax statutes, because they say the County Auditor was not required to make any record in his office or to do anything further about the matter.

If this were true, it would still not be a defense under the South Dakota decisions above set out, or the decisions of this Court and universally from the other states hereinafter set out, and counsel have quite patently overlooked several important sections of the statute in attempting to frame an argument on this point.

The concluding portion of Section 6797 clearly shows that after the special assessments have been certified to the County Treasurer by the County Auditor that all of the proceedings thereafter taken by the County Treasurer are to be identical with those for the collection of the general real estate and other taxes, and that the same period of time to redeem shall be allowed.

Under the express provisions of Section 6799 of the 1919 Code, as amended by Chapter 198 of the Session Laws of 1933, but with this provision unchanged, it was specifically provided that in case of redemption from a sale that, after the receipt of the money paid, "the Treasurer shall enter a memorandum of the redemption in the list of sales and give a receipt therefor to the person redeeming the same, and file a duplicate of the same with the County Auditor, as in other cases."

If the County Auditor did not as a matter of necessity make a record of the special assessments when properly certified to him, what good would it do to provide that in case of redemption therefrom a duplicate of the receipt should

be filed by the County Treasurer with the County Auditor?

Section 12.0807, S. D. C. 1939, which was Section 5927, Revised Code 1919, provides:

> "DUPLICATE RECEIPT BOOK: RECORD OF RECEIPTS OTHER THAN TAXES; RECEIPT TO PAYER; COPY FILED WITH AUDITOR; ENTRY IN CASHBOOK. Whenever the treasurer receives any money, warrants or orders on any account other than taxes charged on the tax duplicate, he shall make out duplicate receipts for the same, one of which shall be delivered to the person paying such money, warrant, or order and the other shall within one week be filed by the treasurer with the auditor in order that the treasurer may be charged with the amount thereof. The treasurer shall then enter the same in his cashbook provided in the preceding section, as in the case of money received for taxes but in a separate and distinct series of numbers of receipts issued therefor."

The reference in this section to any account other than taxes charged on the tax duplicate specifically makes it cover special assessment certificates, and, again, we ask, if the County Auditor does not have the original delinquent assessment list how can he check the duplicate receipts when they are furnished to him by the County Treasurer?

Section 12.0816, S. D. C. 1939, which was Section 5931, Revised Code 1919 unchanged, provides:

> "MONTHLY SETTLEMENT BETWEEN TREASURER AND AUDITOR: DETERMINATION OF BALANCES DUE TAXING DISTRICTS; APPORTIONMENT AND ORDERS FOR PAYMENT. On the first day of each month the county treasurer shall turn over to the county auditor all vouchers for disbursements made by him during the preceding month taking the auditor's receipt therefor and the auditor shall forthwith charge the proper funds therewith and within ten days thereafter the auditor and treasurer shall compare their cashbook and ledger balances and

the auditor shall immediately thereafter, on the application of any township, city, town, or school treasurer, deliver to such treasurer an order on the county treasurer for the amount due such township, city, town, or school district; provided that the person so applying shall file with the auditor a certificate from the proper officer showing that such person is duly elected or appointed treasurer and has given bond as required by law."

These sections so clearly show that the Auditor must have this assessment list in his office in order to comply with them that the entire argument of the petitioner that, simply because this particular County Auditor kept no record the City could not be charged for its failure to provide him with one, is entirely without merit.

While the following section of the South Dakota statute should probably more properly be set out in connection with the portion of this brief dealing with the question of actual damage, we think it fits in better in this portion of the brief, and that is that under the provisions of Section 6804 of the Revised Code of 1919 the period of redemption from a tax or assessment sale was two years, or until such time thereafter as the owner served notice to take tax deed, and sixty days thereafter had intervened.

While South Dakota had this two-year redemption period, it is a matter of common knowledge that private investors bought most of the taxes and assessments which were offered for sale.

By Section 3 of Chapter 198 of the Session Laws of 1933 of South Dakota this period of time was changed to four years, and such time thereafter up to six years until notice might be given, so that when this purported sale was made in 1935 it was made at a time when the law required a pur-

chaser to hold his certificates at least four years and sixty days before he could obtain a tax deed and possession, so that while, if these properties which were delinquent to the number of thirty-two, with the total assessment represented by the thirty-two installments, $9,982.80, had been properly certified and had properly been sold in December, 1932, the buyer could have obtained title and possession of the property by February of 1935, while, as this matter was handled, if it could be found by any possible construction that the 1935 sale was valid, a buyer at that sale could not have obtained title before February, 1940, or five years later.

If proper proceedings had been taken, so that notices to take tax deeds could have been served in December, 1934, it would undoubtedly have forced many of the property owners to pay before the general property taxes had accumulated to the point where there was no equity in the property.

Section 6804, Revised Code of 1919, so far as material, provided:

> "If real property sold for taxes be not redeemed within two years from the date of sale, at any time thereafter and within six years from the date of the tax sale certificate on which the proceedings are based (then follow the provisions for giving notice of intention to redeem) and until sixty days after the service of such notice, the right of redemption from such sale shall not expire. * * * Immediately after the expiration of sixty days from the date of the completed service of the notice hereinbefore provided, the treasurer then in office shall make out a deed for each lot or parcel of real property sold, and remaining unredeemed."

Section 3 of Chapter 198 of the Session Laws of South Dakota for 1933 changed this section in the first three lines, to read: "If real property sold for taxes be not redeemed within four years from the date of sale * * *," etc.

We think it also common knowledge that where general taxes drew eight per cent after delinquent, as they did in South Dakota, and special assessment one per cent per month, that one did not permit special assessments to run at a higher rate and pay the general taxes which were at all times a first lien on the property, so that entirely independently of other authority, it conclusively appears that the petitioner's argument that it would be equitable to disregard this mandatory requirement of certification is wholly without merit.

That our construction of the South Dakota tax laws is correct, finds further support in the decision of the South Dakota Supreme Court in *Knudtson vs. Citizens National Bank & Trust Co.*, 62 S. D. 71, 251 N. W. 810, where in paragraph 4 of the opinion on page 813, the Court said:

> "The County Treasurer could not proceed in any way to collect the tax until it was charged against the taxpayer on the books in the County Auditor's office and a duplicate furnished to the County Treasurer."

This related to a money and credit tax, but it applies to all taxes and assessments in this state and serves to emphasize the provisions of Sections 6402 and 6797 of our Code.

Section 65.0103, S. D. C. 1939:

> "The evidence of the common law, including the law merchant, is found in the decisions of the tribunals.
>
> "In this state the rules of the common law, including the rules of the law merchant, are in force, except where they conflict with the will of the sovereign power, expressed in the manner stated in Section 65.0102."

We take up next the decisions of the United States Supreme Court, and then of a group of other states, for the purpose of showing that the broad language used by the

South Dakota Supreme Court and its territorial predecessor is in fact the universal rule, and we do this also because of the fact that in many of these cases the precise question was whether or not a statute or charter provision for certification was complied with.

The United States Supreme Court in *Lyon vs. Alley*, 130 U. S. 177, 32 L. Ed. 899, considered the validity of a tax deed based upon special assessment improvement certificates for paving, and in holding that the tax deed was void laid down the following rules as to the effect of a failure to observe the statutory provisions for assessment and certification of the assessments on page 902 of the L. Ed.

> "To the correctness of these rulings the appellant's counsel have raised several objections, which it is necessary to consider. It is contended that the requirements of the statute, which were not complied with, were mandatory only so far that it was necessary they should be substantially observed; and that unless some injustice has been done or some inequality occasioned, equity will disregard a mere failure to follow the law. This proposition presents the question whether the failure of the commissioner to deposit with the register a statement of the taxes upon the lots, the failure of the register to place without delay in the hands of the collector a list of the persons taxed, and the failure of the collector to give the required notice to such persons, constituted such a non-observance of the requirements of the statute as to render invalid, as against the appellee, the tax sale and the certificates thereof issued to the appellant.
>
> "In view of the specific and imperative language of these provisions, and more especially of their nature and obvious purpose, we cannot doubt that they were intended as conditions precedent, a strict compliance with which was necessary in order to make the tax chargeable as a lien upon the lots. This question was directly presented and distinctly settled in the case of *French vs.*

Edwards, 80 U. S. 13 Wall. 506 (20:702), in which the rule was laid down with regard to directory and mandatory provisions of tax laws, which has been since approved by the federal and state courts. * * *

"* * * 'But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise.'

"Judge Cooley in his work on Taxation refers to this case and says: 'The doctrine therein stated seems a sound and just rule, and may be reasonably believed to be in accord with the legislative will in the cases to which it is applied.' Chief Justice Shaw, in the earlier case of *Torrey vs. Millbury,* 21 Pick. 64, lays down the same rule in nearly the same terms."

The Circuit Court of Appeals of the Sixth Circuit in *Collier vs. Goessling,* 160 Fed. 604, 87 C. C. A. 506, construed the Tennessee law providing that the County Trustee makes public sale of lands subject to delinquent taxes, and is required to strike off to the State Treasurer all lands or lots so sold when the full amount of the tax penalties and costs are not bid at the sale by some private person, and that he shall then file with the Clerk of the Circuit Court of his county a certified list of the lands so struck off, containing certain information, and the Court reviews a group of Tennessee decisions, in some of which the list, when filed by the Trustee with the Clerk of the Circuit Court, had not been certified as the act required, and had held that a list not certified was invalid, and after citing numerous authorities the Court holds that the Clerk was without authority to make a deed because the list filed by the County Trustee did

not comply with the statute. Certiorari denied 215 U. S. 596, 54 L. Ed. 342.

The Illinois Court in *Glos vs. Cass*, 230 Ill. 641, 82 N. E. 827, held that where the County Clerk's certificate to the delinquent tax list was dated as of a day other than the day advertised for sale, the sale and the deed based thereon were void.

All these cases, and those which follow, clearly show that if the respondent had sued the County Treasurer and his surety for a failure to sell in 1932, 1933, and 1934, 1936 or 1938, that the failure of the City Auditor to certify the delinquencies to the County Auditor, so that the County Auditor could not, and did not, certify them to the County Treasurer, would have been a complete defense to such a suit.

The bondholders, under the pledge of full faith and credit clauses to collect, were entitled to a certificate from the City that would have given a good title to a purchaser at a sale, and not a title that could be set aside in a lawsuit.

It may be argued that even though the 1935 sale was void, the City could still, at this late date, make a proper certification, upon which a valid sale could be made, but surely such a proceeding which could result in a tax deed and possession of the property by sometime in 1945, or ten years later than title and possession would have been obtained under a valid sale in 1932, would not be a valid defense here.

In each of the following cases it was held that the requirement of the statute that the proper city or county officer sign and date a certificate directed to the County Treasurer, or other tax collector, directing him to collect the tax or assessment, was mandatory; that no requirement of the statute can be disregarded; that the form required becomes substance; that the courts are not permitted to speculate as to whether a failure to observe or perform such steps

does or does not result in injury, and that the absence of such certification is a jurisdictional defect making any subsequent sale void:

Brady vs. Davis, 168 Cal. 259, 142 Pac. 45.

Dougery vs. Bettencourt, 214 Cal. 455, 6 Pac. (2d) 499.

Warden vs. Ratterree, 215 Cal. 215, 9 Pac. (2d) 215, 88 A. L. R. 1204.

Shipman vs. Forbes, 97 Cal. 572, 32 Pac. 599.

Cohn vs. Federal Construction Co., 171 Cal. 547, 153 Pac. 916.

Craig vs. People, 193 Ill. 199, 61 N. E. 1072.

Drennen vs. People, 222 Ill. 592, 78 N. E. 937.

Biggins Estate vs. People, 193 Ill. 601, 61 N. E. 1124.

Reynolds vs. Fisher, 43 Neb. 172, 61 N. W. 695.

Platte Valley Milling Co. vs. Malmsten, 79 Neb. 730, 113 N. W. 229, and 79 Neb. 735, 116 N. W. 962.

Huiskamp vs. Breen, 220 Iowa 29, 260 N. W. 70.

Thompson vs. Auditor General, 261 Mich. 624, 247 N. W. 360.

Brase vs. Miller, 195 N. Y. 204, 88 N. E. 369.

Bays vs. Trulson, 25 Ore. 109, 35 Pac. 26.

Peterson vs. Graham, 130 Ore. 290, 282 Pac. 1084.

City of Highlands vs. Johnson, 24 Colo. 371, 51 Pac. 1004.

Devine vs. Wilson, 63 W. Va. 409, 60 S. E. 351.

Plaster vs. Harman, 70 W. Va. 634, 74 S. E. 905.

White vs. Hidalgo County Water Improv. Dist., 6 S. W. (2d) 790.

Parker vs. Maccue, 54 R. I. 270, 172 Atl. 725.

Wildman vs. Enfield, 174 Ark. 1005, 298 S. W. 196.

Stade vs. Berg, 182 Ark. 118, 30 S. W. (2d) 211.

Morris vs. Card, 223 Ala. 254, 135 So. 340.

Craig vs. Swader, 225 Ala. 366, 143 So. 553.

Each of the purported certifications included interest to October 1st (R. 38-44, Finding No. 9, R. 63, f. 84), although the law only allowed interest to September 15th of each year. Chap. 187, S. L. 1929, amending Sec. 6402, 1919 Code of S. D.

Point 3. That Where There Has Been No Valid and Legal Certification of the Delinquent Installments, or the City Has Failed to Diligently Enforce Collection, the City Has Broken Its Pledge of Its Good Faith in the Collection of Such Special Assessments and Has Made Itself Liable for the Entire Amount of the Bonds, Principal and Interest.

The defense of damage without injury is not available to petitioner.

Petitioner has also attacked the method of proof followed in this case, and argues that only nominal damages could be recovered on this record. Respondent submitted proof in exact accordance with the theory on which the McLaughlin and the two Canton cases were decided, and as the McLaughlin case carefully considered the South Dakota laws, we believe that when we showed these breaches of duty on the part of the City that the correct measure of damage was the amount of principal and interest due on the bonds.

The precise question raised by petitioner in this case was raised by the City of McLaughlin, in point 2 of its motion for direction (p. 404, 75 F. 2d), and in its point 5 on appeal (p. 405, 75 F. 2d), and was disposed of on page 410, 75 F. 2d, by the statement:

> "Under the principles announced by the decisions of this Court and the statutes of South Dakota, as construed by the Supreme Court of that State, the plaintiff * * * was entitled to sue for damages for breach

of contract, the measure of his damage being the contract price, or, in this case, the amount due on the bonds, as held by the lower court." (Citing cases.)

The reasons for and the exact justice done by this rule, and the earlier cases upon which it was based, are so fully set out on page 410, and in *Grand Lodge vs. City of Bottineau*, 58 N. D. 740, 227 N. W. 363, and *Hauge vs. Des Moines*, 207 Iowa 1209, 224 N. W. 520; *Freese vs. City of Pierre*, 37 S. D. 433, 158 N. W. 1013, and *Coolsaet vs. City of Veblen*, 55 S. D. 485, 226 N. W. 726, among other cases therein cited in support of the rule, that we feel no citation from them would aid the Court.

In addition to the cases cited in the McLaughlin case, the following cases squarely sustain the judgment herein:

Tillmann Co. vs. City of Seaside, 145 Ore. 239, 25 Pac. (2d) 917.

Miller vs. City of Scottsbluff, 133 Neb. 547, 276 N. W. 158.

City of Cattletsburg vs. Trapp, 261 Ky. 347, 87 S. W. (2d) 621.

City of Cattletsburg vs. Citizens National Bank, 234 Ky. 120, 27 S. W. (2d) 662.

Pine vs. City of Scranton (Pa.), 184 Atl. 253.

Dennis vs. City of Willamina, 80 Ore. 486, 157 Pac. 799.

The Supreme Court in *New Orleans vs. Warner*, 175 U. S. 120, 44 L. Ed. 96, on pages 102 and 103, holds the city liable for failure to collect assessments, and uses the following language:

"But we think a decisive answer to the argument upon both these articles is found in the contract of June 7, 1876, wherein the city purchased of Van Norden the drainage plant, and contracted 'not to obstruct or im-

pede, but, on the contrary, to facilitate, by all lawful means, the collection of the drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed by said parties thereto that collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses as hereinabove provided for, under any pretext whatsoever, until full and final payment of the same.' In respect to this we adhere to the opinion pronounced by us when this case was first before this court, that the city in respect of this purchase acted voluntarily; that it was not, as had been held in the former case of *Peake vs. New Orleans,* 139 U. S. 342, 35 L. Ed. 131, 11 Sup. Ct. Rep. 541, with respect to other warrants a compulsory trustee, but a voluntary contractor; that as the fund was to be partly created by the performance of the city of a statutory duty, it could not deliberately abandon that duty, or take active steps to prevent the further creation of the fund, and then plead a prior issue of bonds as a reason for evading liability upon the warrants. As the city had paid for the property in warrants drawn upon a particular fund, it was under an implied obligation to do whatever was reasonable and fair to make that fund good. Certainly it could not so act as to prevent the fund being made good, and then require the vendor to look to the fund, and not to itself. The duty of the city to collect these assessments was affirmed in *State, Van Norden vs. New Orleans,* 27 La. Ann. 497. See also *Cumming vs. Brooklyn,* 11 Paige 596; *Atchison vs. Byrnes,* 22 Kan. 65."

That the respondent is entitled to recover both principal and interest due on all of the seventeen bonds up to date of trial, and that the judgment, including such amounts, is not erroneous by reason of the fact that six of these bonds had not matured on their face, appeared to the Court and to

respondent to be inescapably correct upon the principle of the McLaughlin and Canton cases, and the many cases cited therein.

Fundamentally it seems plain that when the City, prior to October 1st of each of the years of 1932 to 1936, at least, failed to certify the delinquent special assessments, that the City then became liable to pay the entire amount remaining unpaid on the bonds outstanding, and has remained so liable at all times since that time, subject to credit to it for the bonds paid and interest paid thereon.

It seems to us that any other theory would defeat the fundamental principles of this line of decisions and that the actual due date of the bonds is wholly immaterial where the suit is based upon a breach of the good faith covenant of the bond.

Point 4. That the Respondent Is Entitled to Recover Both Principal and Interest on All of the Bonds, Including Those Not Yet Due on Their Face, or, if Not so Entitled, Is Entitled to Judgment for All Principal and All Interest, and to a Declaratory Judgment That the City of Huron Is Directly and Primarily Liable for the Bonds Maturing November 1st, 1939 and 1940.

So that there might be no question but that the liability of the City of Huron was definitely determined, the respondent, after alleging all of the essential facts in his complaint, did in his prayer for relief (R. 13) pray and demand judgment for a declaration that the City of Huron is directly and primarily liable for the whole amount of principal and interest due on each of the seventeen bonds, and for judgment for the total amount of principal and interest, so that if either the District Court or this Court should disagree

with the respondent on his basic concept of his rights, that judgment could be entered for all principal and interest of past due bonds, interest to date on the unmatured bonds, and a binding declaration under the declaratory judgment act that the City of Huron was directly and primarily liable for the principal and interest to accrue in the future on the six bonds which had not matured on their face at the time of the commencement of this action.

It seems to us to be crystal clear that we had the right to combine these two prayers for relief, and that the utmost that the City could accomplish, if it succeeded in convincing this Court that the trial court and Circuit Court of Appeals were wrong, would be that the judgment be modified and be a full and complete judgment for all principal and all interest due and a binding declaration of liability as to the remaining bonds.

This would certainly do Huron no good. These bonds are drawing the legal rate of interest, six per cent per annum (R. 3), while it is a matter of common knowledge that judgment refunding bonds could be sold at from three to three and a half per cent, so that if such a modification were made it would not benefit the petitioner, and that being true, the Court should not be required to split any fine hairs in attempting to find that our relief should have been divided and a declaration made as to the last six bonds, three of which were due November 1st, 1939, and three of which will be due November 1st, 1940.

The rule which applies in suits against the United States of course applies generally to all municipalities, and the following statement from *Love vs. United States* (8 Cir.), 108 F. (2d) 43, is applicable:

> "In suits against the United States, the judgment of the court must necessarily be largely declaratory in its

nature, because the usual award of process or execution is inappropriate." (Citing numerous cases.)

The prayer in the alternative for a declaratory judgment is based upon all of the allegations of the complaint and is founded upon the declaratory judgment act, Section 400, Title 28, United States Judicial Code and Judiciary, reading as follows:

"(Judicial Code, Section 274d.) Declaratory judgments authorized; procedure. (1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

This proceeding is authorized by Rule 57 of the Federal Rules of Civil Procedure, and the fact that the respondent might have another remedy at a later date is wholly immaterial under the express provisions of Section 400, *supra,* and the decisions of the Courts.

See *Colorado Nat'l Bank vs. Bedford,* 84 L. Ed. Adv. Sheet 13, p. 730.

That the respondent had the absolute right to join this prayer for a declaratory judgment with his prayer for a general judgment appears to be plain from the language of the statute itself, and in our opinion is definitely settled by the decision in *Currin vs. Wallace,* 83 L. Ed. 441, 306 U. S. 11, where, on page 448 of the L. Ed., the Court said:

"The Circuit Court of Appeals found, and the record supports the finding, that there is an actual controversy